No. 01-23

In The

Supreme Court of the United States

ROYAL CARIBBEAN CRUISES, LTD,

Petitioner,

vs.

CLAUDIA DUARTE,

Respondent.

On Petition For A Writ of Certiorari
To The Third District Court of Appeal, State of Florida

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE AND FACTS[1/]

In 1995, Duarte, a Colombian seaman employed by RCCL as a bar waitress, slipped and fell down a poorly lit stairway in one of the lounges aboard RCCL's vessel, injuring her knee, ankle and arm. (T. 4; R. 135, 210, 223). Later that same year she slipped and fell on some soup in the crew's dining room on board the vessel, causing her to re-injure her knee. (R. 223). While working for RCCL, Duarte also developed a thyroid tumor and papillary carcinoma. (R. 224).

RCCL chose to meet its duty to provide Duarte with maintenance and cure by having her receive medical treatment in Miami rather than treating her on board its vessel or repatriating her to Colombia and arranging for her medical treatment there. (T. 12; R. 135). Pursuant to Section 253 of the Immigration and Nationality Act ("INA"), RCCL was required to sign Immigration and Naturalization Service ("INS") Form I-510, guaranteeing payment for "any and all" of Duarte's medical care and treatment incurred or to be incurred during the period she is paroled into the United States. (R. 151, 202). By signing INS Form I-510, RCCL guaranteed that:

> Pursuant to the provisions of section 253 of the Immigration and Nationality Act I, Rafael R. Lopez, Agent of the Sovereign of the Seas

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1/ The Plaintiff/Respondent Claudia Duarte is referred to as Duarte. Defendant/Petitioner Royal Caribbean Cruises, LTD. will be referred to as RCCL.

"A." refers to the appendix included with the petition for a writ of certiorari. "R." refers to the record on appeal in the Florida Third District Court of Appeal. "T" refers to the separately numbered transcript. Emphasis is supplied by counsel unless otherwise noted.

> employing the alien crewman Duarte/Claudia who upon arrival at the port of Miami on 9/14/96 was found to be afflicted with, or suspected of being afflicted with radiculitis lumbar do hereby guarantee to pay any and all expenses incurred or to be incurred for the hospitalization, care, and treatment and for burial in the event of death, of the said alien crewman.

(R. 151). This form was necessary to justify to the United States that Duarte, an alien crewman who does not have a green card, was in this country for medical reasons. (R. 197).

RCCL's agent signed the form guaranteeing payment of Duarte's medical expenses on RCCL's behalf. (R. 173-74, 176, 178). The form meant that RCCL was responsible for paying for all of Duarte's medical expenses. (R. 185). RCCL admits that its guarantee of payment was not limited to those injuries or illnesses listed on the form. Only one illness or injury has to be listed on the form, and only one doctor's letter has to be submitted with the form. (R. 174, 179, 193, 197).

Based on RCCL's guarantee, the INS permitted RCCL to take Duarte off its vessel in Miami so that she could receive medical treatment. (R. 135, 195-96). RCCL's guarantee of payment and Duarte's medical parole were effective for 29 days.

Prior to the expiration of her initial medical parole, RCCL filed for re-parole for an additional 29 days by executing a new Form I-510. (R.152, 181, 197, 203). RCCL continued to renew Duarte's medical parole into the United States up to and including May 1998. See (R. 153-163, 202-214).

On December 14, 1997, during a medical parole valid until January 7, 1998, Duarte was severely injured as a passenger in an automobile accident. (R. 135, 159, 181-82, 198). Duarte was transported to Jackson Memorial Hospital, where doctors surgically reattached her foot. (R. 135). Her medical bills for this accident exceed $99,816. (R. 117, 135). RCCL refuses to pay these bills.[2/] (R. 135). As an alien crewman, Duarte does not have health insurance. (R. 135). The driver who caused the accident does not have insurance. (R. 137). The only insurance available to help pay Duarte's hospital bills for this accident is $10,000 in no-fault insurance for the car she was riding in. (R. 135). Because Duarte was unable to pay Jackson Memorial Hospital's bills, Jackson filed a lien and refused to continue treating her without payment. (R. 136). Duarte made small payments to the hospital from the money she received from RCCL for food and shelter, because she ran the risk of losing her foot unless it was checked regularly. (R. 136).

On January 30, 1998, Duarte filed suit against RCCL to obtain maintenance and cure for the injuries she sustained in the automobile accident. (R. 1-17). On May 14, 1998, RCCL moved for summary judgment claiming that it was not responsible for Duarte's maintenance and cure for these injuries. RCCL claimed that because her contract had expired in March 1997, Duarte was not "in the service of the ship" at the time of the accident. (R. 70-79). RCCL did not offer any affidavits in support of this argument and failed to introduce Duarte's contract or any evidence that she had been discharged

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2/ RCCL continued to pay the medical expenses incurred in treating the injuries Duarte sustained and illnesses which arose while she was on board its vessel. See (R. 254-51). The maintenance and cure and medical expenses for those inflictions are not at issue in this case.

from the ship's service.[3] Nonetheless, the trial court granted RCCL's motion for summary judgment. (R. 252). It subsequently entered final summary judgment in favor of RCCL. (R. 305).

On appeal, Florida's Third District Court of Appeal reversed. It applied two established principles of admiralty law: (1) maintenance and cure is an ancient duty imposed on the shipowner to provide medical care and basic living requirements to a seaman who becomes ill, injured, or incapacitated until the seaman has reached maximum medical improvement; (2) the right to maintenance and cure is liberally construed in favor of the seaman and should not be narrowly confined or restricted in order to defeat its broad and beneficial purposes. (A.1).

Applying these principles, the Third District concluded:

> In the instant case, the Appellant was receiving maintenance and cure at the time of the accident because she had yet to obtain maximum medical recovery. Under such a situation, a seaman is still in the service of the ship and thus entitled to maintenance and cure for the additional injuries incurred. To hold otherwise would fly in the

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[3] RCCL's own actions belied this claim. The affidavits of another RCCL seaman, Ramon Howard, and Richard Alsina, attorney for both Howard and Duarte, demonstrate that RCCL has paid for any and all medical expenses incurred by other alien seamen who are on medical parole in the United States. Howard was a seaman on board RCCL's vessel when he was injured in early 1996. RCCL arranged for his medical parole in Miami. In January 1998, while he was still on medical parole in Miami, Howard began experiencing dental problems. RCCL arranged and paid for his dental treatment. (R. 165-168).

> face of the long standing principles enunciated above.

(A. 1).

RCCL filed for discretionary review in the Florida Supreme Court, which was denied. RCCL has now filed a petition for writ of certiorari seeking review in this Court.

REASONS FOR DENYING THE WRIT

This Court has established general guidelines respecting its decisions to grant or deny petitions for a writ of certiorari. In Rule 10, this Court explains:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted *only for compelling reasons*. . . . A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

28 U.S.C. Rules of the Supreme Court of the United States.

Rule 10 also sets out three general categories in which a case must usually fall before certiorari will even be considered. They generally involve some sort of conflict between different courts. *See, e.g., Braxton v. United States*, 500 U.S. 344, 347 (1991). The first category is conflict between a decision of a United States court of appeals and either another United States court of appeal on the same important federal matter or a decision by a state court of last resort on the same important federal matter. The second

category is conflict between a decision of a state court of last resort on an important federal question and either a decision of a United States court of appeals or a decision by another state court of last resort. Neither category is applicable here. Instead, Petitioner seeks shelter under the third category, which states that this Court may consider granting certiorari when:

> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflict with relevant decisions of this Court.

Rule 10.

Although these categories are not exclusive, they are nonetheless significant. They generally suggest that some sort of conflict must exist before this Court's scant judicial time should be expended in review. As one treatise notes:

> Certiorari decisions are so central to the Court's role that it has not been possible to identify useful formulas to guide petitioners in the quest for review. General public importance of the issues, and the need to secure uniformity of federal law, must be the basic touchstones.

16B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice & Procedure § 4004.1 (2d ed. 1996).

The decision here does not meet these standards. This case does not involve an important federal question which should be settled by this Court. Nor does this case conflict with decisions of this Court.

A. THIS CASE DOES NOT INVOLVE AN IMPORTANT FEDERAL QUESTION WHICH SHOULD BE SETTLED BY THIS COURT.

The issue decided by the Florida Third District Court of Appeal was a very narrow one: the legal status of a seaman who is properly receiving maintenance and cure. The Florida court decided that narrow issue and held that a seaman who is receiving maintenance and cure is "in the service of the ship" and is therefore entitled to maintenance and cure for any additional injuries received before the seaman reaches maximum medical improvement. This was an issue of first impression. Neither Duarte nor RCCL was able to find or cite a single case from any jurisdiction which had specifically addressed this issue. Nor does RCCL cite such a case in its petition. That lack of precedent is telling.

The first time the courts in the United States addressed the issue of a seaman's right to maintenance and cure in a published opinion was in 1823. *See Harden v. Gordon*, 11 F.Cas. 480 (Story, Circuit Justice 1823).[4/] This is now the year 2001. In 178 years, the issue addressed by the Florida appellate court in this case has apparently never before been raised. An issue which arises only once in 178 years or longer does not present such an important issue of federal law as to require this Court's attention. It certainly does not provide a "compelling

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4/ There, Justice Story held that the expenses of curing a sick seaman during the course of a voyage, including medicines, medical advice, nursing, diet, and lodging if the seaman is carried ashore were a charge on the ship. Nine years later, Justice Story addressed maintenance and cure again. In *Reed v. Canfield*, 20 F.Cas. 426 (Story, Circuit Justice 1832), he ruled that a seaman was entitled to maintenance and cure for injuries sustained after the voyage had ended but before he was officially discharged.

reason" for review by this Court.

Moreover, certiorari is unwarranted even if this issue is one which may recur. An issue which has only been addressed by one intermediate state appellate court does not provide fertile ground for this Court's review. As Justice Stevens wrote in *McCray v. New York*, 461 U.S. 961 (1983)(Stevens, J., respecting denial of certiorari):

> I believe that further consideration of the substantive and procedural ramification of the problem by other courts will enable us to deal with the issue more wisely at a later date. *There is presently no conflict of decision within the federal system.* During the past five years, *two state supreme courts* have held that a criminal defendant's rights under state constitutional provisions are violated in some circumstances by the prosecutor's use of peremptory challenges to exclude members of particular racial ethnic, religious, or other groups from the jury. [citations omitted] That premise, understandably, has given rise to litigation addressing both procedural and substantive problems associated with judicial review of peremptory challenges, which had traditionally been final and unreviewable. [citations omitted] *In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.*

461 U.S. at 962-63. *See also Brown v. Texas*, 522 U.S. 940 (1997)(Stevens, J., respecting denial of certiorari)("[T]he

likelihood that the issue will be resolved correctly may increase if this Court allows other tribunals 'to serve as laboratories in which the issue receives further study before it is addressed by this Court.'")(citation omitted). Here, too, there is no conflict in the federal system. There is no decision by even two state supreme courts on the issue of whether a seaman who has not been legally discharged from the ship and who is injured while still receiving maintenance and cure is "in the service of the ship." This issue has not given rise to myriad litigation. There is only this lone decision, a decision which applied settled principles to the fact pattern before it.

This case simply does not involve an important federal question which should be "settled" by this Court. *Rice v. Sioux City Mem. Park Cemetary*, 349 U.S. 70 (1955), explains:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such cases. Nor does it sit for the benefit of the particular litigants. [citations omitted] "Special and important reasons" imply a reach to a problem beyond the academic or the episodic.

349 U.S. at 74. Similarly, Chief Justice Taft, writing for a unanimous court in *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923), wrote:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of *importance to the public*, as distinguished from that of the parties, and in cases where there

> is a *real and embarrassing conflict* of opinion and authority between the Circuit Courts of Appeals.

261 U.S. at 393.

This case is important to the Petitioner RCCL and to the Respondent Duarte. It does not involve a significant issue which is "of importance to the public." The factors which guide this Court's discretionary jurisdiction are not invoked in a case of such limited and "episodic" nature as this one. This Court decides cases with universal implications, not cases which are legally or factually unique. In 178 years, this issue has been addressed by only one court; that fact is potent evidence that this decision does not provide "compelling reasons" for this Court to grant certiorari.[5/]

B. THIS DECISION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT.

Petitioner asserts conflict between decisions of this Court and the decision here. In fact, there is no "real and embarrassing" conflict. *See Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. at 393. Petitioner's contrary assertion should be rejected for two reasons. First, the Florida appellate court applied two hoary principles of admiralty jurisprudence to the issue before it. Those principles are well settled and provide no room for RCCL's claim of conflict. Second, RCCL's argument is based wholly on the asserted fact

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5/ This simple fact is in sharp contrast with RCCL's parade of horribles that it speculates would occur if a seaman receiving maintenance and cure is considered to be "in the service of the ship." *See* Petition for Writ of Certiorari at 18-19.

that Duarte's employment contract had expired. But that argument is not supported by the record or the law.

1. The opinion of Florida's Third District Court of Appeal relies on principles which have been repeatedly acknowledged by this Court.

RCCL complains that the opinion of Florida's Third District Court of Appeal conflicts with decisions of this Court. A cursory review of the opinion demonstrates the opposite. The court carefully followed this Court's precedents. Indeed, the Florida appellate court based its decisions on two principles of admiralty law so settled as to be beyond dispute.

First, the court observed that maintenance and cure is an ancient duty imposed on shipowners for the health and safety of seamen. *See Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960). That duty requires the shipowner to provide medical care and basic living requirements to a seaman who becomes ill, injured, or incapacitated until the seaman has reached maximum medical improvement. This Court has repeatedly said the same. *See, e.g., Vella v. Ford Motor Co.*, 421 U.S. 1 (1975); *Vaughan v. Atkinson*, 369 U.S. 527 (1962); *Farrell v. United States*, 336 U.S. 511 (1949); *Aguilar v. Standard Oil Co.*, 318 U.S. 724 (1943); *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525 (1938).

Second, the court observed that the right to maintenance and cure is liberally construed in favor of the seaman and should not be narrowly confined or restricted in order to defeat its broad and beneficial purposes. This Court has repeatedly said the same. *See, e.g., Vella*, 421 U.S. 1; *Vaughan*, 369 U.S. 527; *Warren v. United States*, 340 U.S. 523 (1951); *Farrell*,

336 U.S. 511; *Aguilar*, 318 U.S. 724; *Calmar*, 303 U.S. 525. Thus, *Warren* explains:

> If leeway is to be given in either direction, all the considerations which brought the liability into being dictate it should be in the sailor's behalf.

340 U.S. at 530 (quoting *Aguilar*, 318 U.S. at 735).

Petitioner does not dispute the accuracy of these principles or their application here. Rather, RCCL asserts that under this Court's precedents, maintenance and cure is only owed to seamen injured "in the service of the ship" and that the Florida decision did not apply this rule. RCCL fails to recognize that Florida's Third District Court of Appeal did apply that principle. The court's opinion states: "Under such a situation [while receiving maintenance and cure], *a seaman is still in the service of the ship* and thus entitled to maintenance and cure for the additional injuries incurred." (A. 1). RCCL's real argument is not that the principle applied by the Florida appellate court conflicts with decisions of this Court, but that the Florida appellate court misapplied a properly stated rule of law. But, "misapplication of a properly stated rule of law" is seldom grounds for granting a petition for certiorari. *See* Rule 10. The decision here, firmly grounded as it is in the decisions of this Court, does not require a departure from that general rule.

In any event, the Florida appellate court did *not* misapply this Court's precedents. RCCL's contrary argument relies on a restrictive definition of "in the service of the ship." It asserts that Duarte could not be "in the service of the ship" while she was receiving maintenance and cure because she was not "subject to the call of duty." *Farrell*, 336 U.S. at 516.

Petitioner relies on a patchwork of isolated statements taken out of context. In fact, under long-standing admiralty law, a seaman receiving cure, whether on the ship or off, is in the service of the vessel.

> "[N]o one would maintain, we believe, that a sick seaman while on board is not 'serving,' though he cannot literally do so. Does it make any difference if the voyage ends before the cure is completed?" The privilege is of very ancient origin . . . and so far as we have found, such part of the 'cure' that may extend beyond the end of the voyage has never been considered different from that which proceeds it. . . . [C]onsider the language, for example, of Justice Story in *Reed v. Canfield* . . . 'The voyage of the ship must, so far as the seamen are concerned, be deemed to commence, when they are to perform service on board, and to terminate, when they are discharged from further service. 'The title' 'to be cured at the expense of the ship is co-extensive with the service in the ship. The seaman is to be cured for injuries and sickness, while he is in the ship's service. It is the benefit from the service, which constitutes the groundwork of the claim.' It is true that in this Story, J. does not specifically declare that the 'cure' is actually a part of the ship's service; but surely that is an appropriate inference.

Cawley v. United States, 272 F.2d 443, 445 (2d Cir. 1959). Here, Duarte was in the United States receiving cure when she was injured in an automobile accident. As such, she was injured while "in the service of the ship."

As the Florida Third District Court of Appeal recognized, this Court's prior case law has eschewed the narrow definition which RCCL would assign to the term "in the service of the ship." The obligation for maintenance and cure arose because of "the irresponsible behavior of shipowners who set disabled seamen ashore at foreign ports to shift for themselves." *Macedo v. F/V Paul & Michelle*, 868 F.2d 519, 521 (1st Cir. 1989). The duty to provide maintenance and cure is one of the most pervasive incidents of responsibility anciently imposed on a shipowner. *Aguilar*, 318 U.S. at 730. This "liability will not be defeated by restrictive distinctions nor 'narrowly confined.'" *Vaughan*, 369 U.S. at 532.

To recover maintenance and cure, the seaman's illness or injury does not have to relate to his duties. *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527 (1938). It applies to injuries a seaman receives when on shore leave or while conducting personal business off the ship. *Aguilar.*, 318 U.S. at 731; *Warren*, 340 U.S. at 529-30. It applies to natural illnesses, as well as accidental injuries, regardless of cause. *See Vaughan*, 369 U.S. 527 (seaman who developed tuberculosis which was diagnosed after he was discharged from employment was entitled to maintenance and cure). A seaman's right to maintenance and cure extends beyond the duration of the voyage. *Calmar*, 303 U.S. at 529. Negligence of the seaman, the how or why of what he was doing, is irrelevant. *Farrell*, 336 U.S. at 515. In fact, so broad is the shipowner's duty to provide maintenance and cure to an ill or injured seaman that only injuries or illnesses incurred as a result of the seaman's willful misconduct will deprive him of that right. *Aguilar*, 318 U.S. at 730. "[T]he breadth and inclusiveness of the shipowner's duty assure its easy and ready administration for '[i]t has few exceptions or conditions to stir contentions, cause delays, and invite litigations.'" *Vella*, 421 U.S. at 4 (quoting *Farrell*, 336 U.S. at 516). Whenever "[t]here are ambiguities

or doubts, they are to be resolved in favor of the seaman." *Vaughan*, 369 U.S. at 532. Simply put, there are no obvious restrictions or distinct bounds on the scope of a shipowner's duty to provide maintenance and cure.

In *Aguilar*, this Court explained some of the reasons for the all-embracing nature of maintenance and cure. It wrote:

> To relieve the shipowner of his obligation in the case of injuries incurred on shore leave would cast upon the seaman hazards encountered only be reason of the voyage. The assumption is hardly sound that the normal uses and purposes of shore leave are "exclusively personal" and have no relation to the vessel's business. . . .
>
> The voyage creates not only the need for relaxation shore, but the necessity that it be satisfied in distant and unfamiliar ports. If in those surrounding the seaman, without disqualifying misconduct, contracts disease or incurs injury, it is because of the voyage, the shipowner's business. That business separated him from his usual places of association. By adding this separation to the restrictions of living as well as working aboard, it forges dual and unique compulsions for seeking relief wherever it may be found. In sum, it is the ship's business which subjects the seaman to the risks attending hours of relaxation in strange surroundings. Accordingly it is but reasonable that the business extend the same protection against injury from them that it gives for other risks of employment.

318 U.S. at 733-34.

The same can be said about Duarte's receipt of maintenance and cure in Miami. Duarte was originally injured and became ill while serving on board RCCL's vessel. The furnishing of maintenance and cure was part of RCCL's duty, a necessary part of its business. RCCL decided to furnish Duarte with the necessary medical care she needed in Miami, rather than in Columbia, thus "separat[ing] [her] from [her] usual places of association." As in *Aguilar*, it was the ship's business which subjected Duarte to the risks of being in Miami. Accordingly it is but reasonable that the business extend the same protection against injury while receiving maintenance and cure in strange surroundings that it gives for other risks of employment.

In sum, the holding of the Florida Third District Court of Appeal that a seaman receiving maintenance and cure is "in the service of the ship" finds firm support in the opinions of this Court. Petitioner has *not* shown that the decision by the Florida appellate court on Duarte's right to maintenance and cure is in "real and embarrassing" conflict with the decisions from this Court.

2. The alleged expiration of Duarte's employment contract does not create conflict with this Court's decisions or general admiralty law.

Significantly, RCCL does not dispute that Duarte was a seaman when she was originally injured nor that Duarte was receiving maintenance and cure, a legal obligation imposed on the ship, at the time she was injured. Instead, RCCL basically argues that Duarte was not "in the service of the ship" because her employment contract had expired. See Petition for Writ of

Certiorari at 9-10. There are multiple problems with RCCL's assertion.

First, even assuming that the employment contract had expired, Duarte, as a matter of law, had not been discharged from her employment with RCCL. Duarte was an alien seaman on medical parole in the United States. As a matter of law, a shipowner cannot unilaterally terminate the employment of such an alien crewman. The shipowner is required to file INS Form I-408 and obtain the INS's authorization before it can discharge an alien seaman in a United States port. *See* 8 U.S.C.A. § 1286 (shipowner must obtain consent of INS before discharging an alien crewman); 8 C.F.R. § 252.1(h)(shipowner must file an application on INS Form I-408 with immigration officer having jurisdiction over the area where vessel is located and receive authorization before it may pay off or discharge an alien crewman); *United States v. Seaboard Surety Co.*, 239 F.2d 667, 671 (4th Cir. 1957)(discussing what is now 8 C.F.R. § 252.1(h); only Attorney General can terminate employment of alien crewmen). RCCL offered no evidence to show that it had complied with the immigration laws and obtained the INS's permission to discharge Duarte. As result, Duarte was still employed by RCCL and was still "in the service" of RCCL's vessel when she was injured.

This Court has previously determined that a shipowner's performance of its statutory duties is an operational activity. When the law requires a seaman's discharge from employment to be accomplished in a certain manner, the seaman is not discharged until those conditions are met. Thus, a seaman remains "in the service of the ship" so long as a statutory obligation is due an employee.

In *Hopson v. Texaco*, 383 U.S. 262 (1966), two seamen became ill in a foreign port and could not continue on the

vessel's journey. The shipowner decided to discharge the seamen. However, under federal law, only the consul is authorized to discharge American seamen in a foreign port. Thus, the shipowner arranged for the seamen to be driven from the vessel to the consul. On the way, the vehicle was in an accident. This Court held that the shipowner's duty to get the seamen to the consul made it an operational activity based on federal law. As such, the seamen were "in the service of the ship" when they were injured.

> *These seaman were in the service of the ship* and the ill-fated journey to Port of Spain was a vital part of the ship's total operations. The ship could not sail with these two men, *nor could it lawfully discharge them without taking them to the United States Consul.* Indeed, to have abandoned them would have breached the *statutory duty* to arrange for their return to the United States. Getting these two seamen to the United States Consul's office was, therefore, the duty of respondent.

383 U.S. at 264. See *also Hopson v. Texaco, Inc.*, 351 F.2d 415, 423, 425 (Sobeloff, J., dissenting)(The term "operational activity" "is not limited to the manipulation of the ship's gear. It includes the recruitment of the crew and furnishing of maintenance and cure to seamen when ill."), *rev'd*, 383 U.S. 262 (1966).

Although the issue in *Hopson* was the shipowner's liability under the Jones Act and not maintenance and cure, the principle remains the same. Just as the law did not allow the shipowner in *Hopson* to discharge an American seaman in a foreign port without the consent of the U.S. consul, it does not allow a shipowner to discharge an alien seaman in an American

port without the consent of the INS. RCCL had to apply for and receive authorization from the appropriate immigration officer in order to pay off or discharge an alien seaman like Duarte. *See* 8 U.S.C.A. § 1286; 8 C.F.R. § 252.1(h). It failed to do so. Thus, she was not "discharged" from her employment. And, like the seamen in *Hopson*, she was "in the service of the ship" when she was injured in the automobile accident.

RCCL asserts that this Court should ignore this fact and this law because it was not the grounds on which the Florida appellate court reversed the trial court. Nonetheless it provides an alternative basis for the decision by the Florida Third District Court of Appeal. Thus, even a decision by this Court that a seaman receiving maintenance and cure is not always "in the service of the ship," would not be determinative of RCCL's liability here.

Second, RCCL did not file the employment agreement as part of its summary judgment motion. Under Florida law, it was RCCL's burden to introduce that contract if it desired to rely on it. RCCL claims that Duarte's "non-employment" status was not disputed in the trial court. Petition for Writ of Certiorari at 20. However, under Florida law, Duarte had no obligation to dispute anything until RCCL met its burden and conclusively demonstrated that there was no genuine issue of material fact. *Holl v. Talcott*, 191 So.2d 40, 43 (Fla. 1966)("[T]he burden of proving the absence of a genuine issue of material fact is upon the moving party. Until it is determined that the movant has successfully met this burden, the opposing party is under no obligation to show that issues do remain to be tried."). Assertions by RCCL and its attorney that the employment contract had expired cannot be accepted as evidence of that fact under Florida law. *Gumberg v. Gumberg*, 745 So.2d 554 (Fla. 4th DCA 1999)("We have explained in the

past that, absent a stipulation, unsworn attorney statements cannot take the place of evidence."); *Sears Roebuck & Co. v. Polchinski*, 636 So.2d 1369 (Fla. 4th DCA 1994)("We remind attorneys of our previous admonition that unsworn statements or representations of counsel, absent a stipulation, cannot be considered evidence.").

Third, under established admiralty law, a shipowner's duty to provide maintenance and cure is not based on the seaman's contract or articles. *See Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367 (1932). In fact, the signing of articles or a contract is not a prerequisite to a seaman's right to maintenance and cure. *Hunt v. The Trawler Brighton, Inc.*, 102 F.Supp. 300 (D.Mass. 1952)(seaman was in service of the ship when he was injured although he was home for 48 hours between trips and although there were no articles or employment contract; at the time of the accident seaman had not been discharged and had done nothing to terminate his employment). The fact that a seaman's articles or contract has expired is not determinative of a seaman's right to maintenance and cure. "The right to maintenance and cure stems from the employer-employee relationship but is not in all circumstances completely coextensive with it." *LeBlanc v. B.G.T. Corp.*, 992 F.2d 394, 396, 399 (1st Cir. 1993)(seaman who was fired and later injured before leaving the vessel was entitled to maintenance and cure; the right to maintenance and cure does not necessarily end when the employment relationship expires, taking that type of mechanical approach "would as a matter of policy be incompatible with the [Supreme] Court's repeated eschewal of the sharp-edged rules limiting seamen's rights"); Reed v. Canfield, 20 F. Cas. at 428 (although seaman's articles expired at the end of the voyage, seaman injured before he was discharged was entitled to maintenance and cure). Simply put, even assuming Duarte's contract had expired, that does not mean that RCCL owed no duty to provide her with maintenance

and cure.

In sum, there no conflict between the decision of the Florida Third District Court of Appeal here and the decisions on maintenance and cure by this Court. Instead, the Florida appellate court's opinion is well supported by that precedent. The decision provides no occasion for this Court's exercise of discretionary jurisdiction.

CONCLUSION

For the foregoing reasons, Respondent, Claudia Duarte, respectfully requests that this Court deny certiorari in this action.

Respectfully submitted,

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